UNIVERSITY OF TORONTO
FACULTY OF LAW

PROPERTY LAW
CASEBOOK VOL II

Professor Abraham Drassinower

Fall 2019

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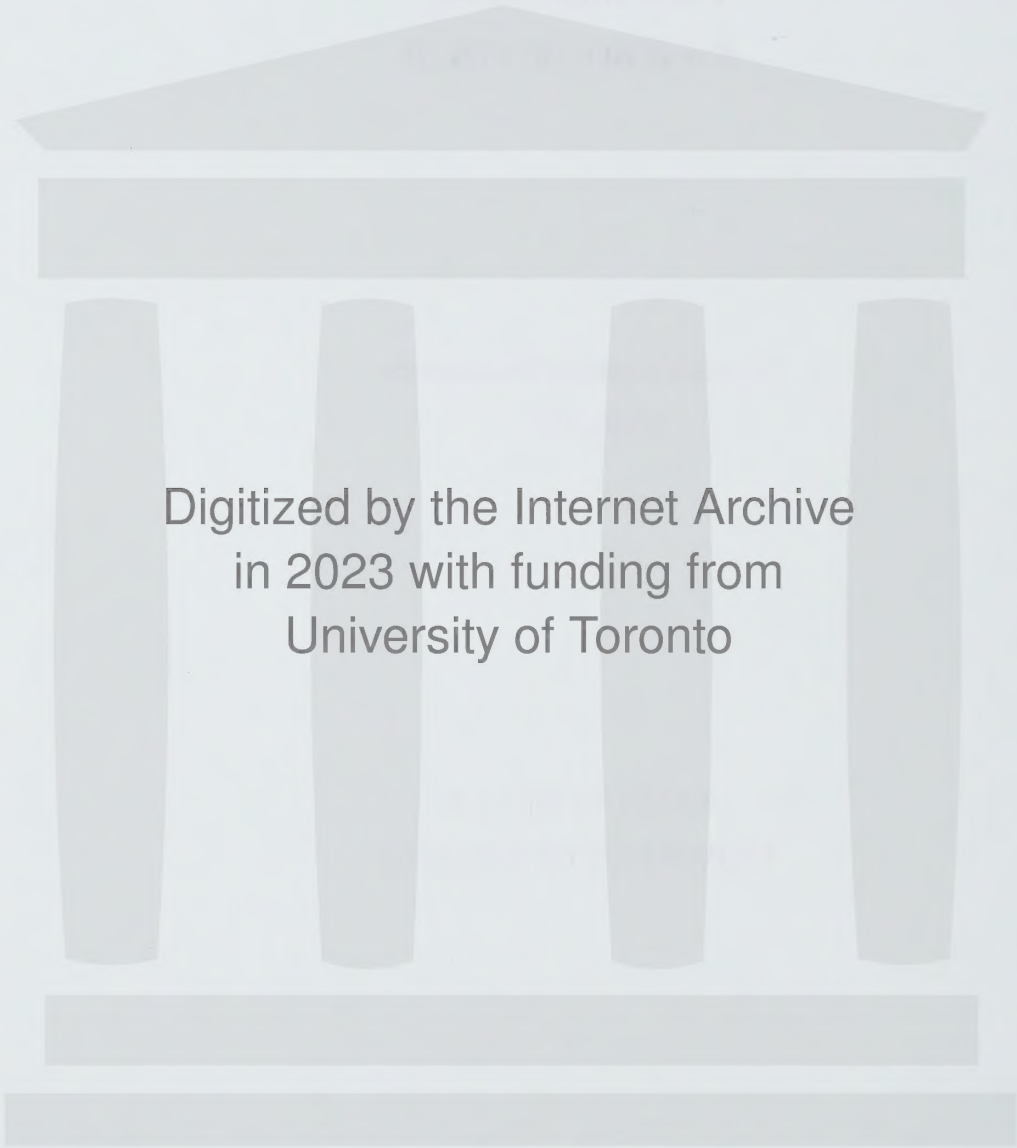

Table of Contents

Volume One

CHAPTER ONE: POSSESSION AND TITLE AT COMMON LAW
(a) Introduction: What is Possession? 1

Pierson v. Post (1805) 3 Cai. R. 175 2

Clift et al. v. Kane et al (1870) 5 Nwfld L.R. 327 7

The Tubantia [1924] All ER 615 (Pr. & Ad. Div.) 15

Popov v. Hayashi (2002) WL 31833731 21

(b) Finders: General Principles 31

Armory v. Delamirie (1722) 93 E.R. 664 32

Keron v. *Cashman et al.*, 33 A. 1055 (N.J. Chancery 1896) 33

Note 35

(c) Finders and Occupiers 36

Parker v. *British Airways Board*, [1982] 1 QB 1004 (C.A.) 37

(d) Finders and Illegality 55

(e) Adverse Possession of Land: Introduction 58

Merrill, "Property Rules .....and Adverse Possession" (1985) 79 *Northwestern University Law Review* 1122 62

(f) Adverse Possession: The "Quality" of Possession 74

Re St. Clair Beach Estates v. MacDonald (1974), 50 D.L.R. (3d) 650 (Ont. Div. Ct.)..... 76

Mendes da Costa and Balfour, *Property Law* (Toronto, 1982) 80

Re Lundrigans Ltd. and Prosper et al. (1982), 132 D.L.R. (3d) 727 (Nfld. C.A.)..... 82

Notes..... 84

Beaudoin v. *Aubin* (1981), 125 D.L.R. (3d) 277 (Ont. H.C.) 85

(g) Adverse Possession and the Inconsistent Use Test: Judicial Repeal? 90

Masidon Investments v. *Ham* (1984), 45 O.R. (2d) 563 (C.A.) 90

Notes 98

(h) Retreat from the Inconsistent Use Test 101

Buckinghamshire County Council v. Moran [1989] 2 All E.R. 225 C.A. 102

Teis v. Ancaster Town (1997), 35 O.R. (3d) 216 (C.A.) 127

Mutual Mistake or Unilateral Mistake 134

Rose, "Possession as the Origin of Property" (1985) 52 *University of Chicago Law Review* 73 136

CHAPTER TWO: BAILMENT

Heffron v. Imperial Parking Co. et al (1974), 3 O.R. (2d) 722 152

Fairley & Stevens (1966) Ltd. v. Goldsworthy (1973), 34 D.L.R. (3d) 554 161

Punch v. Savoy's Jewellers Ltd. et al. (1986), 54 O.R. (2d) 383 174

Taylor Estate v. Wong Aviation Ltd. [1969] S.C.R. 481 186

CHAPTER THREE: GIFTS

Cochrane v. Moore (1890), 25 Q.B.D. 57 194

In re COLE, A BANKRUPT. Ex parte THE TRUSTEE OF THE PROPERTY OF THE BANKRUPT. [No. 486 of 1961] 215

Kooner v. Kooner, [1979] B.C.J. No. 84 235

Brown v. Rotenberg et al. [1946] O.R. 363-376 239

Re Zachariuc; Chevrier v. Public Trustee, (1984) 16 E.T.R. 152 (Ont. Dist. Ct.) 246

CHAPTER FOUR: THE NATURE OF PROPERTY

Moore v. The Regents of the University of California et al. (1990) 793 P.2d 479 251

International News Services v. Associated Press 248 U.S. 215 (1918)....287

Notes....307

Victoria Park Racing and Recreation Grounds Ltd. v. Taylor [1937] HCA 45....310

Stewart v. The Queen (1988), 50 D.L.R. (4th) 1 (S.C.C.)....334

Notes....348

Caratun v. *Caratun* (1992), 42 R.F.L. (3d) 113 (Ont. C.A.)....349

Notes....359

Saulnier v. Royal Bank of Canada, [2008] 3 S.C.R. 166....360

Tsilhqot'in Nation v. British Columbia, 2014 SCC 4....375

Volume 2

CHAPTER FIVE: THE RIGHT TO EXCLUDE

Harrison v. *Carswell* (1975), 62 D.L.R. (3d) 68 (S.C.C.)....1

Notes....13

Cadillac Fairview Corp. v. R.W.D.S.U. (1989) 71 O.R. (2d) 206 (Ont. C.A.)....15

T.W. Merrill, "Property and the Right to Exclude"....28

CHAPTER SIX: INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY - THE DOCTRINES OF TENURE AND OF ESTATES

(a) Introduction to Tenure and Estates....38

Gray, *Elements of Land Law*....38

(b) Types of Estates: Gray, *Elements of Land Law*....41

R. Scane, Notes on Life Estates and Estates in Fee Tail....42

Note on Presumptions and Words of Limitation....44

(c) Present and Future Interests....46

(d) Introduction to Conditional Estates 48

(e) Conditions Subsequent: Defeasible and Determinable

Re McColgan, [1969] 2 O.R. 152 50

(f) Conditions and Uncertainty 56

Sifton v. Sifton, [1938] 3 All E.R. 435 (P.C. – Ont.) 57

Clayton v. *Ramsden,* [1943] A.C. 320 (H.L.) 63

Notes 79

(g) Conditions and Public Policy 80

Re Noble and Wolf, [1949] 4 D.L.R. 375 (Ont. C.A.) 81

Notes 97

Re Canada Trust Co. and Ontario Human Rights Commission (1990), 69 D.L.R. (4th) 321 (Ont. C.A.) 98

Notes 107

Restraints on Alienation: General 113

Laurin v. *Iron Ore Company of Canada* (1977), 82 D.L.R. (3d) 634 (Nfld. S.C.T.D.) 115

Stephens v. Gulf Oil Canada Ltd. et. al., (1975) 25 C.P.R. (2d) 64 (O.C.A.) 121

CHAPTER SEVEN: EASEMENTS

(a) Introduction 129

(b) Characteristics of Easements 130

In Re Ellenborough Park, [1956] 1 Ch. 131 (C.A.) 131

Notes 163

Positive and Negative Easements 164

Phipps v. *Pears*, [1965] 1 Q.B. 76 (C.A.) 165

(c) Creation by Express or Implied Grant

Express Grants and Reservations 174

Implied Grants and Reservations 174

Exceptions to the General Rules 177

Wong v. *Beaumont Property Trust*, [1965] 1 Q.B. 173 (C.A.) 180

Sandom v. *Webb*, [1951] 1 Ch. 808 (C.A.) 193

Barton v. *Raine* (1980), 114 D.L.R. (3d) 702 (Ont. C.A.) 219

Toronto-Dominion Bank v. Wise, 2016 ONCA 629 224

Problems 228

(d) Creation by Presumed Grant 230

User as of Right 232

Garfinkel v. *Kleinberg*, [1955] 2 D.L.R. 844 (Ont. C.A.) 234

(e) The Scope of Easements and Termination 237

CHAPTER EIGHT: LANDLORD AND TENANT LAW – COMMERCIAL

Introduction to the Leasehold 239

Leases and Licences 239

Metro-Matic Services Ltd v Hulmann (1973), D.L.R. (3d) 326 (Ont. C.A.) 241

The Independence of Covenants 246

From Property to Contract? Abandonment 247

Goldhar v. Universal Sections and Mouldings Ltd. (1962), 36 D.L.R. (2d) 450 (Ont. C.A.) 248

Highway Properties Ltd. v. Kelly, Douglas & Co Ltd. [1971] SCR 562 253

Notes 259

A Tenant's Obligation to Pay Rent and Landlord Remedies.....263

Country Kitchen Ltd. v. Wabush Enterprises Ltd. et al. (1981), 120 D.L.R. (3d) 358 (Nfld. C.A.).....266

Relief Against Forfeiture.....271

Re Jeans West Unisex Ltd and Hung et al. (1975), 60 D.L.R. (3d) 446 (Ont. H.C.).....273

CHAPTER NINE: LANDLORD AND TENANT LAW - RESIDENTIAL TENANCIES

Introduction.....276

Security of Tenure.....278

Termination of Tenancies: Landlords' Rights.....279

Jaffer v. Sachdev (1989), 6 R.P.R. (2d) 86 (Ont. Dist. Ct.).....280

Notes.....282

Termination of Tenancies: Tenant Fault.....285

Walmer Developments v Wolch (2003), 67 O.R. (3d) 246 (Div. Ct).....290

Notes.....292

Problem.....294

The Residential Tenancies Act, S.O. 2006, c. 17

Part I – Introduction.....295

Part II – Tenancy Agreements.....299

Part III – Responsibilities of Landlords.....301

Part IV – Responsibilities of Tenants.....304

Part V – Security of Tenure and Termination of Tenancies.....304

Part VII – Rules Relating to Rent.....323

Part XI – The Landlord and Tenant Board.....324

Part XII – Board Proceedings.....324

CHAPTER TEN: APPROPRIATION OF PERSONALITY

Krouse v. Chrysler Canada Ltd. (1973) 1 O.R. (2d) 225 326

Athans v. Canadian Adventure Camps Ltd. (1977) 80 D.L.R. (3d) 583 334

Gould Estate v. Stoddart Publishing Co. (1996), 30 O.R. (3d) 520 (G.D.) 343

Notes 347

CHAPTER ELEVEN: COPYRIGHT

Walter v. Lane, [1900] A.C. 539 (H.L.) 349

CCH Canadian Ltd. and Others v. The Law Society of Upper Canada, [2004] 1 S.C.R.339 373

CHAPTER TWELVE: TRADEMARKS

Mattel, Inc. v. 3894207 Canada Inc., [2006] 1 S.C.R. 772 398

CHAPTER THIRTEEN: PATENTS

Diversified Products Corp. v. Tye-Sil Corp. (1991), 35 C.P.R. (3d) 350 (F.C.A.) 421

(C) PRESENT AND FUTURE INTERESTS

The preceding pages demonstrate that the estates system recognizes a variety of different interests in land. The next sections will show that the common law also allows for conditional estates, interests in land which may either not arise until the happening of a certain event or which may be terminated in the future by the occurrence of a certain event. Once we know that it is possible to have an interest in land less than the fee simple absolute (life estate, fee tail, conditional fee simple), the next question is - what happens to the rest of the fee simple absolute, that is, the rest of the time, in any given piece of realty? The answer is that the law recognizes future interests in land, interests held by persons other than those in possession in the present.

Gray's *Elements of Land Law* puts it this way: "Through the doctrine of estates the common law was able to organise the allocation of certain powers of management, enjoyment and disposition over land in respect of particular periods or 'slices' of time. Moreover, as the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an immediate conceptual reality to each 'slice' of time represented by an 'estate'. In other words, any particular 'slice' of entitlement in the land could be viewed as having a present existence, notwithstanding that its owner was not entitled to possession of the land until some future date. In a world of concepts it was quite easy to conceive of rights to successive holdings of the land as 'present estates coexisting at the same time'. It was ultimately this feature of the time-related aspect of the 'estate' in land which made it possible for the common lawyer to comprehend the notional reality of immediate dispositions of, and dealings with, future interests in land."

In fact, the common law recognizes two types of future interests: a reversion and a remainder.

A reversion is any interest retained by the grantor: for example, in the grant "to A for life" the grantor, assuming that he or she holds the fee simple absolute, has not disposed of his or her full interest. The grantor has a reversion in fee simple. A reversion does not need to be specified, it arises by operation of law from the failure by the grantor to alienate the entire interest.

A remainder is an interest created in a third party which follows the granting of an estate less than the fee simple absolute. For example, in the grant "to A for life, then to B", B has a remainder in fee simple but no right to possess the land until A dies. Note that in this example the grantor has no reversion -- he or she has given away the full fee simple.

Note that the above is a very cursory discussion of future interests. The area is a lot more complicated and technical than this, but given that this is an introductory course I do not think it necessary or useful to go into all of the details. Those who like to use Ziff's *Principles of Property Law* will find a good review of the area in chapter 7 of the fourth edition.

PROBLEMS

In answering these questions consider both what kind of estate a person has, and whether it is one of present or future possession.

1) A has a fee simple estate and executes a deed stating: "I give my land to B". What estate does B have, and why?

2) A has a fee simple estate and makes a will stating: "to B for life, and on the expiry of B's life to C for life". What interests do A, B and Chave?

3) A has a fee simple estate and makes a will stating: "I give my land to B for the life of C, then to D for life, then to E. What interests do A, B, C, D and E have? What happens if B dies before C?

D) INTRODUCTION TO CONDITIONAL ESTATES

We have seen that estates in land are temporal 'slices' of the rights to the possession, use and enjoyment thereof. So far we have considered these estates as 'absolute', as belonging unconditionally to someone. Estates may, however, be granted subject to conditions. Conditions can be of two kinds.

Conditions Precedent. First, there can be conditions of eligibility, or what are known technically as conditions precedent. These must be satisfied before the grantee has any right of enjoyment at all. For example: 'to A at 21', or 'to B for life if she should marry Y'. Until A turns 21, or until B marries Y, they have only what are called *contingent* interests. If either die before the condition is met, or if the condition becomes impossible of performance (for example, if Y dies before B marries him) the interest will be extinguished and there is nothing that can pass to heirs. Conversely, if A becomes 21, or if B marries Y, then the condition is satisfied and the interest becomes a *vested* interest.

This does not mean that the owner of a vested interest has an immediate right to possession. That is the case in the two examples given above, but it is not so in the grant "to A for life, then to B for life if she reaches 21". At the time of the grant, assuming B is not 21, her interest is contingent. If she reaches 21 while A is still alive, her estate becomes *vested in interest*, but she has no right to possession until A dies.

It should be noted here that the common law generally favours early vesting where there is any doubt about whether a grantor or testator/testatrix intended to create a vested or contingent interest. *Mackay* v. *Nagle et al* (1988), 30 E.T.R. 191 (N.B.Q.B.) illustrates this point. The testator left his property to his wife for life "and thereafter to my living children in equal shares". His four children were alive when the will took effect, but one died during his widow's lifetime. Did the word "living" mean children alive at the time the will took effect, in which case the now-deceased child's interest would be vested and would descend to his heirs? Or did it mean living at the time the widow's life estate expired, in which case it would be a contingent interest, the condition precedent being surviving the widow? In coming to the conclusion that the interest was vested, the court considered extrinsic evidence of the testator's intention when the will was made. But it relied largely on a series of cases establishing the principle that, in ambiguous cases, "the courts generally follow a rule of construction favouring early vesting".

Conditions Subsequent. The second kind of condition, the one that will principally concern us here, is a condition of defeasance, known as a condition subsequent. These operate to defeat an estate which has already vested. For example: 'to C in fee simple, but if he ever becomes a member of the Law Society of Upper Canada, to D in fee simple'. If C acquired the land in 1960 with this condition attached, the estate was vested at that time but was liable to be divested at a future date if C became a lawyer.

These conditions of defeasance are personal if they relate to the person; if C died in possession and never having joined the legal profession, his heirs will inherit a fee simple absolute. But they are not personal, will go with the land, if the condition relates to use of the land itself.

While I have used the term "fee simple" here, any estate can be made subject to conditions.

There are two kinds of conditions subsequent, which are conceptually distinct and which have different consequences if the condition is breached or found invalid. This is an area of excessive technicality which, as with future interests generally, I choose to skip over. More about it can be found in Ziff, *Principles of Property Law*, fourth edition, pp. 222-225. For current purposes you need only to know the distinction between a condition precedent and a condition subsequent.

(F) Conditions and Uncertainity

This section and the next consider why the courts will intervene and declare a condition to be void. Broadly speaking one can delineate two reasons why courts will strike down conditions: the condition is either uncertain, or it is contrary to public policy.

In addition to considering the formal rules on these criteria, you should read the cases bearing in mind that conditional estates provide an excellent illustration of the relationship between property and power. If the law were to allow grantors to impose any conditions they wished, that would have the effect of increasing the number of strands in every land owner's bundle of rights. But that would also give those land owners substantial power over subsequent land owners (successors-in-title). Often conditions are imposed by one generation on the next, and this issue of controlling the next generation in this way is often referred to "dead hand from the grave" problem - the dead person's hand is permitted to reach out from the grave and control the life of his or her beneficiary. See here the testator's desire to limit his daughter's choice of marriage partner in *Clayton* v. *Ramsden*. Moreover, it is also the case that a legal regime which did not restrict the content of conditions would permit private power to advance ends that are unacceptable if pursued in the public sphere: *Re Noble and Wolf* and *Re Canada Trust and Ontario Human Rights Commission* both raise this problem.

The next two cases deal with uncertainty. Consider what degree of "uncertainty" appears to be required, and why? Neither case is about land, but the rules on uncertainty are the same whether realty or personalty is involved.

(G) CONDITIONS AND PUBLIC POLICY

The next two cases deal with the meaning of "contrary to public policy". This is a difficult notion to define. It includes conditions contrary to law - which means both conditions mandating an illegal act and conditions which seek to subvert the course of law. An example of the latter is a condition providing for divestment if the grantee becomes a bankrupt. The bankruptcy law of the jurisdiction, not the grantor, provides for the disposition of property on bankruptcy: see *Re Machu* (1882), 21 Ch. D. 838.

Beyond this category, it is difficult to say why the content of certain kinds of conditions attracts judicial disapprobation as contrary to "public policy" and others do not. The best one can do is to describe categories and ascribe the choices traditionally made to the values of the English judiciary. Looking at the cases as a whole, most conditions traditionally held to be invalid as against public policy were considered so because they represented restraints on marriage, conditions encouraging divorce or separation, conditions affecting parental duties, or restraints on alienation. We will not discuss the first three categories any further, and the latter is dealt with at the end of this chapter.

The issue of concern here is the relationship between private property, public policy, and what we now call unacceptable discrimination. As you will have gathered from *Clayton* v. *Ramsden*, "discrimination" has not traditionally been a reason for voiding conditions. The racial and religious distinctions made in the will in that case attracted little comment. *Re Noble and Wolf* deals explicitly with the validity of discriminatory terms - consider in particular the line drawn by the court between private choice and public policy and the concern expressed, especially by Hogg J. A., about not inventing new grounds of public policy. Consider also, by way of contrast, how both concerns are dealt with by the court in the much more recent *Re Canada Trust* case.

You should note that neither of these two cases involves a condition attached to land. *Noble and Wolf* is about a restrictive covenant, a topic we will cover in a later chapter. *Re Canada Trust* is about a charitable foundation and personal property. Do not concern yourselves with these distinctions; the purpose of the cases is to consider what should be the scope of "public policy".

CHAPTER SEVEN:

EASEMENTS

(This chapter taken from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity

of the owner of the land at any given time.

B) CHARACTERISTICS OF EASEMENTS

The first issue we will look at is that of what kinds of rights the law will consider to constitute valid easements. The common law will not simply consider any agreement between two landowners to have created an easement. To qualify, the right granted must meet the four-fold test laid out in *Ellenborough Park* below. In that case there was no question that an agreement was made between vendors and purchasers in 1855; but only if that agreement created a right in the nature of an easement can it still be enforced 100 years later. The four principal requirements are laid out below, and you should make sure that you understand what each means and how the court assesses them in light of the facts of the case.

POSITIVE AND NEGATIVE EASEMENTS

A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century, a point established in *Re Ellenborough Park.* However, it should be noted that the numerous examples given here are all of what are termed "positive easements". That is, they involve A's right to do something on B's land. But there are also a few negative easements recognised - easements which give A the right to prevent B doing something with his or her land. Those known to the law are the right to light, the right to air by a defined channel, the right to lateral support for buildings, the right to continue to receive the flow of water from an artificial stream.

Note that the support right mentioned is a right specifically excluded from the list of "natural rights" which come with the fee simple. Included within the category of "natural rights" are the right to subjacent support for land and buildings, and the right to lateral support of land. Thus while some support rights are "natural", others must be "acquired".

Phipps v. *Pears* involves a claim for a negative easement - an easement of protection from the weather. Do not concern yourself at this stage with how any easement might have been created. Consider the arguments for and against permitting this and other negative easements. What values animate the judiciary in this instance?

C) CREATION BY EXPRESS OR IMPLIED GRANT

EXPRESS GRANTS AND RESERVATIONS

The common law maintains that all easements "lie in grant"; that is, they must be created by one person with an interest in land granting the right to another. (This will usually involve fee simple owners but it need not do so). The grant of the easement may be separate from the grant of an estate or joined with it. Obviously there was a grant in the *Ellenborough Park* case, the original owner of the land granting to each purchaser of a house the right to use the pleasure grounds.

At this stage we need to introduce the distinction between express grants and express reservations. Consider again the example used in the introductory note to this chapter of a person's wish to sell off part of a piece of land surrounded on three sides by woods and on one side by a road. The land will be divided into two with one part "landlocked". If the seller parts with the landlocked part and gives the buyer an easement, he or she grants both an estate and an easement. This is called an express grant of an easement. However, if the seller wants to keep the landlocked part and to sell off the part that fronts the road, and in doing so makes an agreement that he or she can have access to the road over the buyer's land, he or she has reserved the easement in the grant. The seller has kept something back. This is called an express reservation of an easement, although note that it is still being created in a grant.

There will obviously be no problem in arguing that an easement has been created, whether by express grant or express reservation, if the words in the grant are clear. If the words are less than clear, however, the deed will be construed in favour of the grantee (this is a general rule). Thus in a doubtful case it will be much easier to argue for the existence of an express grant than for an express reservation.

If you think that the word "grant" is being used here both as a verb (the process of giving) and as a noun (the transaction) you are correct. This is potentially confusing though it need not be; one can either expressly grant an easement in a grant or expressly reserve the easement in a grant.

Express grants and reservations are easy to understand, and we will do no more on them. It should be noted, however, that as it involves an interest in land the grant of an easement (by grant or reservation) must conform to the rules of the jurisdiction regarding the transfer of interests in land.

IMPLIED GRANTS AND RESERVATIONS

It was stated above that "all easements lie in grant" at common law. In reality this is a fiction, for the law permits the creation of implied easements and prescriptive easements (easements

established by long use). The fiction is maintained by calling these respectively easements obtained by implied grant and easements obtained by presumed grant. Presumed grants are dealt with in section (d) below.

Implied grants and reservations represent situations in which the law implies into a land transaction which is silent on the subject an agreement to also create an easement. As with express grants, the rules are different as between implied grants and implied reservations. Mendes da Costa and Balfour, *Property Law: Cases, Texts and Materials,* does a good job of laying out the general principles:

The situation in which easements are most commonly created by implication occurs when there is a severance of a possessory interest in land into two or more interests. This can happen, for example, when the owner of two lots sells one of them, when a homeowner leases one floor of his house to a tenant, or when a testator provides by will for the division of his real property for two or more devisees. In such cases, easements appurtenant to any of the several parts of the land may of course be created expressly. But if they are not, when do easements arise by implication?...

The leading case on many aspects of the question, regularly quoted and followed by English and Canadian courts, is Wheeldon v. Burrows (1879) 12 Ch.D. 31 (CA); it is the best introduction to the modern law. In Wheeldon, Tetley owned a piece of vacant land and an adjoining industrial property on which had been built a factory and several workshops. In January 1876, he conveyed one lot of the vacant land to the plaintiff's husband and shortly thereafter sold the industrial land to the defendant. Although the deed to the plaintiff's husband had not expressly reserved any right over the land for the benefit of Tetley's other property, the defendant claimed, as Tetley's successor, an implied easement of light which prevented the plaintiff (who succeeded to her husband's property at his death) from constructing any buildings which interfered with the flow of light to the windows of one of his workshops. When the defendant acted on that claim by knocking down a fence which the plaintiff had erected, she brought an action in trespass, seeking an injunction. At trial, the Vice Chancellor found that no such easement had been reserved by Tetley when he conveyed the land to the plaintiff's husband and accordingly the plaintiff prevailed. The defendant appealed.

In dismissing the appeal, Thesiger L.J. took the opportunity to review comprehensively the case law on the question of implied easements. His conclusion has become the leading statement of general principles:

"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), [1] or, in other words, all those easements which are necessary to the reasonable

[1] A quasi-easement is a right which would be an easement but for the fact that the dominant and servient tenements are owned by the same person. Example: if X owns two adjoining lots, Blackacre and Whiteacre, and uses a path over the former to get to the latter, he or she has a quasi-easement of

enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury in Suffield v. Brown ... it appears to me that it has existed almost as far back as we can trace the law upon the subject."

The authorities, Thesiger L.J. went on to say, are to the effect that an implied grant must be distinguished from an implied reservation: as a result of the principle that "a man cannot derogate from his own grant ... as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee". Later he said: "in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land".

EXCEPTIONS TO THE GENERAL RULES

In the passage quoted above Thesiger L.J. referred to exceptions to the general rules, and cited one - "ways of necessity". The others are discussed below. "Ways of necessity" are rights of way to land that would otherwise be landlocked. Because of the fiction that all easements are created in a grant, the traditional position of the common law was that even an access right to otherwise landlocked land was the product of the intention of the parties, not a result of some public policy, even though in the vast majority of cases courts have professed to find such an intention. You can see the application of this doctrine in the *Wilkes* v. *Greenway* case, discussed above in the chapter on adverse possession. The successful adverse possessor did not gain an easement because there was clearly no intention among the parties that he do so. Some commentators and judges have suggested that public policy (presumably a policy of utilisation of land by the owner) ought to require an easement of necessity in such circumstances, but this position was rejected by the English Court of Appeal in *Nickerson* v. *Barraclough* [1981] 1 Ch. 246 (C.A.), a case in which the normal implication of intention was specifically negatived by a clause in the conveyance.

In Ontario the *Road Access Act*, R.S.O. 1990, c. R-34 effectively provides a statutory easement of necessity. Sections 2 and 3 of the Act provide:

1. (1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless

(a) that person has made application to a judge for an order closing the road...;

(b) the closure is made in accordance with an agreement with the owners of the land affected thereby;

(c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or

(d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

2. (2) No person shall construct, place or maintain a barrier or other obstacle over a common road that as a result prevents the use of the road unless

(a) that person has made application to a judge for an order closing the road...;

(b) the closure is of a temporary nature for the purposes of repair or maintenance of the road.

3. The judge may grant the closing order upon being satisfied that the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or is reasonably necessary for some purpose in the public interest and the judge may impose such terms and conditions

as the judge considers are reasonable and just under the circumstances, including a requirement that a suitable alternate road be provided.

In reviewing the material below on the other three exceptions, you should note that judges and writers on the subject may organise them differently than is done here, but the substance of what they say is the same.

The second exception is that of mutual easements. An obvious example is one of support enjoyed by two houses built touching each other. Another example is discussed in Balfour and Mendes da Costa, *Property Law: Cases Texts and Materials:*

Thesiger L.J. further considered the question of whether there were other exceptions to the principle against implied reservation and discussed, in this connection, Pyer v. Carter (1857), 156 E.R. 1472 (Exch.) and Richards v. Rose (1853) 156 E.R. 93. In disapproving Pyer for denying any distinction between implied reservation and implied grant, Thesiger L.J. had summarized the facts of the case as follows:

"A house was conveyed to the Defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the Plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the Defendant's premises over the Plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the Plaintiff's premises was conveyed into a drain on the Plaintiff's premises, which drain passed through the Defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the Plaintiff, and upon an obstruction of the drains in the Defendant's house, which, be it observed, immediately caused a flooding of the Plaintiff's house by the very water coming from the Defendant's house, the Plaintiff brought his action, and it was held there that the Plaintiff was entitled to maintain his action, and that upon the original conveyance to the Defendant there was a reservation to the grantor of the right to carry away this water which came from the Defendant's premises by the medium of the drain which also went through his premises".

He then said of Pyer:

"I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied."

The third exception is provided by situations in which it is necessary to imply the reservation of an easement in order to permit a grantor to fulfill his or her obligations to a grantee in a simultaneous sale of two pieces of land. Again, Balfour and Mendes da Costa's discussion of

Wheeldon deals with this exception:

Thesiger L.J. also alluded - although it was not raised by the facts of the case - to the question of easements implied in the case of simultaneous grants where the grantor, instead of severing part of his land and retaining the rest, conveys all his land to two or more grantees at one time. He referred to Swansborough v. Coventry (1832), 131 E.R. 629:

"That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says 'It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is ...that no man shall derogate from his own grant.... And in the present case, the sales to the Plaintiff and the Defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law'".

The final exception is much more general. It is contained in the quotation from *Pwllbach Colliery Company* v. *Woodman* cited in *Sandom v. Webb* below: "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used".

The three cases below deal with various aspects of the implied grant and reservation rules and exceptions. *Wong* involves an implied grant, and you should ask yourself whether this is a case falling under the general rule on implication or under the necessity exception or under the fourth exception. *Sandom v. Webb* and *Barton* v. *Raine* concern implied reservations, and in particular the operation of the fourth exception delineated above.

D) CREATION BY PRESUMED GRANT

This section examines the third of the three ways by which easements can be created - by "presumed" grant. This is also known as creating easements by prescription. Although the crucial factor is long use the fiction of creation by grant in a transaction between parties is retained in English law through the notion that the grant of an easement either preceded "legal memory" (pre-1189) or was made in modern times (post-1189) but had been lost. The first of these types of presumed grant has never been available in the Canadian common law of real property. The second was once available but in both Canada and England legislation, initially introduced to simplify and standardize the rules on "lost modern grants", now governs the vast majority of claims. These legislative provisions, initially contained in the English *Prescription Act* of 1832, are now contained in Ontario's *Real Property Limitations Act*. For the purposes of this course you need only concern yourself with prescriptive easements arising under the *Act*.

Prescription is not like adverse possession, despite the fact that the *Real Property Limitations Act* and the notion of long use are common to both. Prescription applies only to non-possessory rights and requires lesser acts than possessory title does, and it is not even formally cast as a defence. There are other significant differences also, as outlined in the legislative provisions reproduced below and in the extract from Mendes da Costa and Balfour which follow them. The relevant sections of the Act are:

31) No claim that may be made lawfully at the common law, by custom, prescription or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed, or derived upon, over or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before-mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way or other matter as herein last before-mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

32) Each of the respective periods of years mentioned in sections 30 and 31 shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereon and of the person making or authorizing the same to be made.

33) No person shall acquire a right by prescription to the access and use of light or to the access and use of air to or for any dwelling-house, work-shop or other building, but this section does not apply to any such right acquired by twenty years use before the 5th day of March 1880.

35) No easement in respect of wires or cables attached to property or buildings or passing through or carried over such property or buildings shall be deemed to have been acquired or shall hereafter be acquired by prescription or otherwise than by grant from the owner of the property or buildings.

These sections should be read in conjunction with the following commentary by Mendes da Costa and Balfour, *Property Law: Cases, Texts and Materials*

Under these provisions, the following are the points of significance:

1) Section 31 establishes two different periods for the creation of prescriptive easements. These periods are twenty and forty years.... After twenty years of adverse use, an easement cannot be defeated by showing that user began after 1189. This merely facilitates the operation of prescription at common law by eliminating one kind of defense. Thus, while an easement by prescription at common law could not be created in Ontario apart from this provision, section 31 makes "time immemorial" irrelevant and enables a prescriptive easement to be created at common law in this province. Apart from showing user began after 1189, a claim for a prescriptive easement after twenty years' adverse use may still be defeated by any other defence that was available at common law.... After forty years of adverse use, the easement becomes "absolute and indefeasible". This is not as definite as it appears. The basic rule that prescription must operate for and against a fee simple estate still applies. Thus, a tenant cannot prescribe against his landlord .... Also a claim based on forty years' adverse use may be defeated, as could a twenty-year claim, by showing that the user was forcible or secret, or enjoyed by written permission. On the other hand, a forty-year claim cannot be defeated, as a twenty year claim can, by proving it was enjoyed by oral permission....

2) Section 32 only comes into play when there is litigation and the relevant period of user must immediately precede the bringing of the action. Thus, forty years of adverse use does not of itself create an "absolute" prescriptive easement. An action must be brought and the necessary period of enjoyment must be immediately prior to the commencement of that action.

3) The period must be "without interruption". This does not mean mere nonuser by the person claiming the easement. It means that the claimant has not been obstructed from enjoying the use.

4) No act is deemed to be an interruption for the purpose of section 32 unless the person claiming the easement has submitted to interruption for one year.

Example of the operation of sections 31 and 32 X has been crossing Y's property as if he had an easement for 19 years and one day. The next day Y prevents X from crossing by placing an obstruction in the way of passage. At this time, X has no right to cross as he cannot show twenty years of enjoyment. However, if X sues for a prescriptive easement one year from the day after he had enjoyed the use for nineteen years, he will succeed. X will now be able to show twenty years of enjoyment prior to bringing the action. The interruption will not count as it was for one year less a day. X could not have brought his action sooner as he would have been short of the twenty year period required. An action brought by X on the following day will be too late as the interruption will now have lasted a year and section 31 can no longer apply....

The law relating to prescription is both confusing and complex. Confusion and difficulties under the present law arise from:.....

- having two different periods under the statute when one would be sufficient
- tying the prescription periods under the statute to the commencement of an action;

- requiring long periods of adverse enjoyment, considering that ten years' adverse possession is sufficient to create a possessory title;
- the poor drafting of the statutory provisions....
- the obscureness of the law as to the meaning of "user as of right"; and
- the difficulty or undesirability, in some cases, of having to make "interruptions" in the running of time by the creation of physical obstructions.

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USER AS OF RIGHT

Merely establishing that the right has been exercised for the correct period of time is not enough to make out a claim for a prescriptive easement. The common law rules on the nature and quality of use also have to be adhered to. These were developed in the context of "lost modern grant" claims, but have always been used for statutory prescription also. It might be useful to think of these as laying down requirements for the quality of use of an alleged easement in the same way that the courts developed rules for the quality of possession in adverse possession law.

The principal rules are twofold. First, the use must be continuous. This does not mean that the claimant must have used the alleged easement every day. Continuity is judged according to the nature of the right being asserted - see the discussion of *Axler* v. *Chisholm* below.

Second, the claimant of the easement has to have exercised "user as of right". This means that the claimant has to have exercised the alleged right in such a way that he or she can be seen as having said: "Of course I have a right to do this". Conversely, the servient tenement owner can be said to have acquiesced in the use by right. This requirement of "user as of right" is said to consist of three sub-rules, summarized in the Latin maxim *nec clam, nec vi, nec precario* - no secrecy, no violence, no permission.

"No Violence" requires the claimant to have used the easement without brushing aside significant protest by the owner. Note, however, that similar acts can represent both an assertion of a right and use not by right but by violence. Take the case of a right of way which the servient tenement owner blocks off. If the dominant tenement owner removes the obstruction the court may well find that he or she is saying: "I am removing the obstruction because it is my right to use this path and you have no right to block it". If the servient tenement owner does nothing further, the court might also say that he or she has acquiesced to this assertion of a right. But if another obstruction is placed in the way, and again removed, we get much closer to non-acquiescence and a violation of the "no violence" rule. Thus whether an action constitutes "user as of right" or user by violence can depend on all the circumstances.

"No secrecy" means that the easement must be used openly so that the servient tenement

owner knows about it and acquiesces. When dealing with the "no secrecy" requirement courts use phrases such as openly, notoriously, without stealth, etc. This is a good statement of the principle: "the rights alleged may only be claimed if the benefit was enjoyed as of right, in an open and notorious manner sufficient to convey to the mind of the servient owner the fact that a claim was being asserted which, if it was acquiesced in, would ultimately ripen into a right". Thus again acquiescence is at the root of prescription.

A case on secrecy is *Axler* v. *Chisholm* (1977), 79 D.L.R. (3d) 97 (Ont. H.C.). The plaintiff argued that she was entitled to a prescriptive easement over a part of the defendant's lake front lot for the purpose of storing a portable dock. The plaintiff had stored her portable dock on the defendant's land from October to May every year between 1945 and 1969, at which point the defendant objected. The evidence showed that until 1952 the owner of the servient tenement only visited it twice a year during the summer; it was otherwise undeveloped and unoccupied. In 1952 the lot was sold, and the new owner probably came to know about the storage of the portable dock and permitted it. In 1968 the property was again sold, to Chisholm, who, the following year, objected to having the dock stored on his land. Craig J. held, inter alia, that no prescriptive easement had been established. The necessary 20-year prescription period ran from 1950 until the plaintiff began her action in 1970. And on the facts there had not been 20 years of continuous "user as of right". The fact that the use was seasonal and intermittent did not of itself prevent it from being continuous, for continuous means different things in different circumstances. But the intermittent nature of the use meant that in the circumstances it was "clam". The "no secrecy" requirement meant that the servient tenement owner must have had knowledge, actual or constructive (the means of knowledge), of use of the easement, and the onus of proving such knowledge rested with the plaintiff. In this case the plaintiff was unable to show that the owner between 1950 and 1952 had such knowledge, since the dock was stored on the land in wintertime and the owners only visited the lot in summer. Craig J stated: "it should not be held that an owner of a vacant summer cottage lot has an obligation to inspect his or her boundaries of the lot at certain seasons of the year; or that failure to do so would be to risk loss of property rights".

The issue of permission is dealt with in *Garfinkel* v. *Kleinberg,* below. As you read it pay special attention to the difference between acquiescence by the servient tenement owner and permission from that person.

D) THE SCOPE OF EASEMENTS AND TERMINATION

Scope. An easement granted for one purpose cannot be used for another. See *Malden Farms Ltd.* v. *Nicholson* (1956), 3 D.L.R. (2d) 236 (Ont. C.A.). In 1916 the owner of the servient tenement granted the owner of the dominant tenement (which was farmland) a right of way across his land for persons, animals and vehicles. In the early 1950's the successor in title to the dominant tenement began to develop the land as a beach resort, and the right of way was used by increasingly large numbers of vehicles. The Court of Appeal sustained an injunction granted to the successor in title to the original owner of the servient tenement. Aylesworth J.A. noted that the applicable principles were to be found in *Gale on Easements*:

> According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconveniences imposed upon the servient tenement - e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the mode as distinct from the extent of user) must, it seems, be ascertained from the intention of the parties at the time when the right was created.

He then held that "the burden of the easement has been markedly increased.... [It] is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll-road." Thus the appellant's use of the right of way was an "unauthorized enlargement and alteration in the character, nature and extent of the easement."

See also *Re Gordon et al and Regan et al* (1985), 15 D.L.R. (4th) 651 (Ont. H.C.). The parties were each entitled to a right of way over a mutual private drive to reach their respective lots. In 1922 the predecessors in title to one of the parties had bought some adjoining land and built a garage on it and then used the drive to reach that land also, which practice was continued by the party in this action. But he now wanted to convert the house into two semi-detached houses and to allow the purchasers of the second house to use the right of way to get to the adjoining land and garage. Griffiths J. held first that a right of way remains attached to each part of a dominant tenement if it is sub-divided and that, absent any specific restrictions in the grant, a reasonable increase in use is permissible. He then held that the proposed use was improper because a right of way appurtenant to one lot cannot be used colourably to reach a different, adjoining lot.

Termination. There are a number of ways to extinguish an easement. First, by statutory provisions allowing an application to the court for an order terminating the easement. While these are common with respect to restrictive covenants (see chapter seven below), few common law jurisdictions have such legislation for easements. In Canada only British Columbia does: *Property Law Act*, R.S.B.C. 1979, c. 340, s. 31 (2).

Second, an easement is terminated by operation of law if the purpose for which it is granted comes to an end, or if the right is abused (as in the *Malden Farms* case noted above), or if it was granted with a time limit and the time expires, or if the owner of the dominant and servient tenement becomes the same person. Note, however, with respect to this last point that if the same person comes into possession of the two tenements under different estates, the easement will merely be suspended.

Third, an easement can be terminated by release, express or implied. The burden of proof is very high on the owner of a servient tenement who wants to argue implied release; merely showing that the use was stopped for some period of time will not suffice. The stoppage must amount to an abandonment of the easement. In *Barton v. Raine*, above, Thorson J.A. dealt thus with an argument that the easement that a period of non-use had terminated the easement:

> the interruption in its use which occurred following the father's stroke did not impair that easement, which, once acquired, could only be lost by non-user on evidence clearly establishing an intention to abandon it. As pointed out by the trial Judge, the circumstances of the non-user in this case were not consistent in any way with an intention to abandon the right.

CHAPTER EIGHT:

LANDLORD AND TENANT LAW – COMMERCIAL

(This chapter taken from Jim Phillips, *Property Law: 2018*)

INTRODUCTION TO THE LEASEHOLD

The principal characteristic of the landlord-tenant relationship at common law is that the leasehold interest is conceived of as an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a property relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may modified by negotiation or even breached. The buyer has an estate and can exclude the seller; dealings between the two are at an end.

So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises". The lesser interest demised is that of exclusive possession of land for a definite or potentially definite period of time. A leasehold estate cannot be of uncertain duration.

The next three sections expand on the point that a lease confers an estate in land, not merely certain contractual rights and obligations, by examining the distinction between leases and licences, the doctrine of the independence of covenants, and the legal consequences that flow from physical abandonment of the demised premises by the tenant.

LEASES AND LICENCES

It is one thing to say that a lease is the grant of a leasehold estate, but knowing that will not tell you whether a particular agreement constitutes a lease or some other arrangement between the parties over use of land. The most common "other" legal form to an alleged lease is a licence, which is simply permission to use land for some purpose. If you let somebody park in your driveway, for example, you have granted them only a licence. Knowing which of the two has been created in any agreement is often vital, for at common law a licence is revocable at any time by the licensor. [Equity will enforce a contractual licence, one in which consideration has been paid, but even then

it is effectively revocable provided damages are paid.]

An obvious example of an agreement that could be a lease or a licence, and of the importance that flows from deciding which is involved, comes from thinking of a superintendent in an apartment building. He or she works for the owner and usually lives in one of the apartments. If the agreement to occupy the apartment was construed as being only a licence, as but one term of many in the contract of employment and given in order to make it easier to carry out the terms of employment, the superintendent would have no legal protection outside any terms contained in the licence, the contract. If the same agreement to occupy was seen as a lease, and therefore completely independent of the employment relationship, the superintendent could claim whatever protection the jurisdiction's legal regime chose to give to tenants, whether or not he or she continued to work for the owner. As it happens, this situation is largely covered by a provision of the Residential Tenancies Act in Ontario, but the example should help to point up the significance of the lease/licence distinction.

However, stating which consequences flow from whether an agreement for the occupation of land is a lease or a licence is easier than deciding whether that agreement is a lease or a licence. Indeed, this can be quite a difficult question. If an agreement is uncertain as to duration, it will be a licence. But certainty of duration is only a necessary, not a sufficient condition, for a lease. Beyond that, the cases reveal two approaches to deciding whether a particular agreement is a lease. One line of cases states that if the agreement grants, or intends to grant, exclusive possession for a fixed time it is a lease. That is, the only thing that matters is whether the right to exclusive possession has been granted. If it has, the agreement is a lease and grants an estate, whether or not it uses the word licence 100 times. Another, more recent, line of cases suggests that it is the intention of the parties that matters; if they intend to be landlord and tenant, then the court will give effect to that intention. Thus a document that looks like a licence can be held to be a lease because of its language, so that exclusive possession is granted to the lessee irrespective of what the document says. Conversely, by this approach a document that grants exclusive possession for a term can be held to be a licence because the parties call it a licence.

The *MetroMatic* case below illustrates this latter approach, which is the one preminently used by the courts. Note that the 'lease' contains a variety of clauses relating to matters beyond the simple question of the right to occupy the land. These terms are called covenants in a lease, the equivalent of 'contractual terms' in other kinds of agreements. Such covenants seem to limit the tenant's rights of exclusive possession, and one might be tempted to say that any such limit means that exclusive possession has not been granted. Alternatively and conversely (or perhaps perversely) one might say that such limits are the work of the tenant, and therefore an exercise of his or her right of exclusive possession.

THE INDEPENDENCE OF COVENANTS

One of the incidents of the landlord-tenant relationship being a property relationship is the doctrine known as "the independence of covenants". Covenants are terms in the lease in addition to the grant of the estate itself by which either or (usually) both parties agree to undertake certain duties - the landlord might provide heat, for example, or agree to trim a hedge, while the tenant would agree to pay rent or repair wear and tear. To say that covenants are "independent" at common law means that failure by either party to perform an obligation does not give a right to the other to terminate the lease. That is, performance of an ancillary obligation is independent of the duty to perform corresponding ones and/or the principal one. As McDonald C.J.B.C. put it in *Falleson* v. *Spruce Creek Mining Co*, [1942] 4 D.L.R. 708 (B.C.C.A.): "a lessor cannot re-enter for mere breach of covenant". However, he also noted that if re-entry for that particular breach was made "an express term in the lease", the lessor could do so. That is, if the lease was made conditional on the performance of that particular ancillary obligation then breach of the obligation would enable the landlord to end it. This is not an exception to the independence of covenants, but an application of the notion, seen already in chapter three, that estates may be conditional.

Laskin, *Cases and Notes on Land Law*, puts it this way: "Where a bargain is made for the lease of premises ... on terms embodied in a formal document of lease, the lessee (at least on entry) acquires an estate which he holds subject to those terms. The pertinent question is to what extent is the transaction regarded as the transfer of an interest in land (and hence governed by rules and doctrines developed as part of the law of estates) and to what extent is it regarded as a business dealing (and hence governed by rules and doctrines developed later as part of the law of contracts).... Where the relationship was still that of lessor and lessee (before entry into possession) the common law tended to emphasize the contractual aspect of the bargain.... Once, however, tenure was established, whether in pursuance of a formal lease or of an agreement for a lease, property conceptions dominated. This was particularly true in respect of the covenants of the respective parties. Apart from express provision on the matter, the contract rule of dependency of promises was ignored. Thus, the tenant was not entitled to be excused from further performance or to terminate his lease unless there was a breach of condition by the landlord rather than a mere breach of covenant."

In recent years there has been some undermining of this notion, a matter to which we will return.

FROM PROPERTY TO CONTRACT? ABANDONMENT

There are a variety of ways by which a leasehold relationship can be ended, one of which is known as "surrender". Using an old definition, this is "the yielding or delivering up of lands or tenements and the estate a man has therein, unto another that has a higher and greater estate". "Surrender" cannot be unilateral, it is not brought about merely by the tenant quitting the premises, an action we should call "abandonment". If the tenant obtains the landlord's agreement (express or implied) to his or her leaving, such agreement converts mere abandonment into surrender.

What if the tenant wants to surrender half way through a one-year lease and the landlord does not? Putting aside any issues relating to specific performance, apply to this problem what you have learned in contract law. You would tell the tenant that he or she is probably best to just get out and hope that the landlord, who has a duty to mitigate damages, will find somebody else to rent the premises at the same or a reduced rent. Your client would be liable for damages for breach, but they might not be that heavy, being only the difference between what you would have paid and what the landlord can get somebody else to pay. Conversely, you would probably advise the landlord that he or she cannot make the tenant stay, that the best thing to do is to secure the premises and try to find another tenant knowing that you can sue the defaulting tenant for any shortfall.

But, as we have seen, a lease is not a contract, it is an estate. And according to classical principles that means that if it is granted for twelve months it lasts for twelve months, unless surrendered, in which case it is absolutely at an end with no future obligations on either side. So, according to this classical property law analysis of the problem, as laid out in *Goldhar* below, you would have to tell the tenant something different. You would have to say that whether or not he or she physically abandons the premises the lease subsists for 12 months and he or she is liable for the whole term. The landlord has no duty to mitigate damages. But hopefully the landlord will do something foolish like re-enter and change the locks, in which case he or she will be considered to have accepted that a surrender has taken place and your client will have no liability left at all. So it's all or nothing for the tenant. Conversely, if advising the other side, you would caution the landlord that finding another tenant would be interpreted as a surrender and no rent could be got from the defaulting tenant. If the landlord wanted to get such rent, he or she would have to leave the premises unoccupied. Moreover, the landlord cannot sue for the whole of the term's rent when the tenant decamps after 6 months but must wait until it becomes due and is not paid (assume it's due monthly).

All of this is explained in *Goldhar*. Both that case and *Highway Properties*, which follows it, also show that there are some wrinkles in the traditional position and that factual considerations relating to such matters as whether, and if so when, the landlord accepted the abandonment and therefore brought about a surrender can be very important. As you read *Goldhar*, think about why the traditional position reinforces the principal lesson of this chapter - that the lease is a property relationship. You will also see that *Highway Properties* alters the traditional law: given the result in that case, how would you answer the question contained in the first clause of the heading to this section?

A TENANT'S OBLIGATION TO PAY RENT AND LANDLORD REMEDIES

Rent is not a requirement of the leasehold relationship, and therefore there was no implied obligation to pay it at common law. But if it is included in the lease, and of course that is invariably the case, then the common law imposed an obligation to pay. If rent is included in a lease the obligation to pay it is now a statutory condition: see Ontario's *Commercial Tenancies Act*, s. 18 (1), below.

If the tenant fails to pay rent the landlord has a number of options. First, he or she can choose to end the lease - called a forfeit of the lease. This may be done either by a physical re-entry by the landlord, or through an action for possession. In either case the landlord may also, and obviously usually would, sue for rent due.

At common law the right to forfeit could be exercised as soon as the tenant failed to pay rent, but under the statute the tenant has 15 days to pay. See Commercial Tenancies Act, R.S.O. 1990, c. L-7, s. 18, which both makes the payment of rent a statutory condition, not an independent covenant, and gives the tenant 15 days before the condition becomes operative.

18 (1): Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to reenter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate.

Note that s. 18(1) says 'unless it is otherwise agreed.' Many commercial leases do indeed include a provision shortening the 15-day grace period. Such provisions also typically require the landlord to give notice of the default and of its intention to terminate as a result.

A landlord has another remedy to use for unpaid rent, one unique to it among all "creditors". The landlord may levy distress on the tenant - seize the tenant's goods which are on the demised premises and sell them to meet the rent due. However, distress is a remedy which flows only from the existence of the landlord-tenant relationship, and therefore it requires that relationship to continue. That is, the landlord generally cannot both forfeit the lease and take distress. The only exception to this principle comes in s. 41 of the *Commercial Tenancies Act*, reproduced below

Distress is an ancient remedy, and an unusual one. Ziff calls it a "powerful remedy" and a "relic of feudalism": *Principles of Property Law*, 4th edition, p. 283. It allows the landlord to summarily take the tenant's goods that are found on the demised premises and sell them to meet the rent arrears. Creditors generally must use the courts to enforce debts. There are limits on the kinds of property that can be taken, limits defined both by the common law and by statute. The *Commercial Tenancies Act* also contains a variety of other provisions regulating distress, some of which are reproduced here:

31 (2) - A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction does not apply in favour of a person claiming title under an execution against the tenant, or in favour of a person whose title is derived by purchase, gift, transfer, or assignment from the tenant whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods or chattels on the premises in the possession of the tenant under a contract for purchase, or by which the tenant may or is to become the owner thereof upon performance of any condition, nor where goods or chattels have been exchanged between tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor does the restriction apply where the property is claimed by the spouse, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of the tenant's, if such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase gift, transfer or assignment from any relative to whom the restriction does not apply.

41 - A person having any rent due and in arrear, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the lease, in the same manner as the person might have done if the lease had not been ended or determined, if the distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

43 - Distress shall be reasonable.

47 - Save as herein otherwise provided, goods or chattels that are not at the time of the distress upon the premises in respect of which the rent distrained for is due shall not be distrained for rent.

48 (1) - Where any tenant ... fraudulently or clandestinely conveys away, or carries off or from the premises the tenant's goods or chattels to prevent the landlord from distraining them for arrears of rent so reserved, due, or made payable, the landlord or any person lawfully empowered for that purpose by the landlord, may, within thirty days next ensuing such conveying away or carrying off, take and seize such goods and chattels wherever they are found, as a distress for such arrears of rent, and sell or otherwise dispose of them in such manner as if they had actually been distrained by the landlord upon such premises for such arrears of rent.

48 (2) - No landlord or other person entitled to such arrears of rent shall take or seize, as a distress for the same, any such goods or chattels that have been sold in good faith and for a valuable consideration, before such seizure made, to any person not privy to such fraud.

49 - Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, the tenant's servant, or agent, or other person aiding or assisting therein, are or are believed to be in any house, barn, stable, outhouse, yard, close or place, locked up, fastened or otherwise secured so as to prevent them from being taken and seized as a distress for arrears of rent, the landlord or the landlord's agent may take and seize, as a distress for rent, such goods and chattels, first calling to the landlord's assistance a peace officer who is hereby required to aid and assist

therein, and, in case of a dwelling house, oath being also first made of a reasonable ground to believe that such goods or chattels are therein, and, in the daytime, break open and enter into such house, barn, stable, outhouse, yard, close or place and take and seize such goods and chattels for the arrears of rent as the landlord might have done if they were in an open field or place upon the premises from which they were so conveyed or carried away.

50 - If a tenant so fraudulently removes, conveys away or carries off the tenant's goods or chattels, or if any person wilfully and knowingly aids or assists the tenant in so doing, or in concealing them, every person so offending shall forfeit and pay to the landlord double the value of such goods or chattels, to be recovered by action in any court of competent jurisdiction.

NOTE - The fraudulent removal provision in s. 50 was applied in *Park Street Plaza Limited* v. *Surinder Bhamber* (1992), 23 R. P R. (2d) 288 (Ont G.D). The court found that the tenant had indeed removed goods from the premises for the purpose of preventing the landlord from taking distress. The rent owed was a little less than $10,000, the value of the goods removed $25,000. The court then held that s. 50 gives no discretion: "it is a mandatory provision that the amount of the penalty shall be double the value of the goods or chattels, and I accordingly fix that particular penalty at the amount of $50,000."

53. Where any goods or chattels are distrained for any rent reserved and due upon any demise, lease or contract, and the tenant or owner of them does not, within five days next after such distress taken and notice thereof, with the cause of such taking, left at the dwelling house or other most conspicuous place on the premises charged with the rent distrained for, replevy the same, then, after the distress and notice and the expiration of such five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn to appraise them truly, according to the best of their understandings, a memorandum of which oath is to be endorsed on the inventory, and after such appraisement the person so distraining may lawfully sell the goods and chattels so distrained for the best price that can be got for them towards satisfaction of the rent for which they were distrained and of the charges of the distress, appraisement and sale, and shall hold the overplus, if any, for the owner's use and pay it over to the owner on demand.

54. Where a distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the person distraining, or by that person's agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefore deemed to be unlawful, nor the person making it be deemed a trespasser from the beginning, but the person aggrieved by the unlawful act or irregularity may recover by action full satisfaction for the special damage sustained thereby.

55 (1) A distrainer who takes an excessive distress, or takes a distress wrongfully, is liable in damages to the owner of the goods or chattels distrained.

It was noted above that distress and forfeiture are mutually exclusive remedies. This is the product of the "property" nature of the landlord-tenant relationship. Distress can only be taken if the lease is alive, and doing so therefore constitutes the landlord's recognition of the continuation of the

CHAPTER NINE

LANDLORD AND TENANT LAW - RESIDENTIAL TENANCIES

(This chapter taken from Jim Phillips, *Property Law: 2018*)

INTRODUCTION

Since c. 1970 all Canadian jurisdictions have enacted separate statutory regimes for residential, as opposed to commercial, tenancies. These regimes vary from province to province. That of Ontario is now to be found in the *Residential Tenancies Act*, S.O. 2006, c. 17, portions of which are reproduced at the end of this chapter. The *Residential Tenancies Act* has been amended a few times since 2006, most notably by *An Act to amend the Residential Tenancies Act*, S.O. 2017, c. 13, otherwise known as the *Rental Fairness Act*. The predecessor to the *Residential Tenancies Act* was the *Tenant Protection Act*, brought in by the Harris conservative government in 1997, and the predecessor to that was the *Landlord and Tenant Act, Part IV*. I give all these names because the cases refer to them, depending on when a case was decided. Despite the name changes of the statutes, the content of individual sections did not change much.

Residential tenancies statutes deal principally with the legal rights and obligations of landlords and tenants. But they, or in some cases separate legislation, deal also with the *economics* of the relationship and with procedural matters. Re the former, Ontario and many, but not all, other provinces have long had some form of rent control, more properly called rent review because most schemes provide for a gradual increase in rent over time. Ontario has had two forms of rent review. Before the passage of the *Tenant Protection Act* in the 1990s the rent was attached to the apartment. Rent review was maintained in the *Tenant Protection Act*, but for sitting tenants only. New tenants were no longer protected. In other words, the system was changed from one in which the rent for the premises was controlled, to one in which the rent for a tenant is controlled so long as he or she resides in the premises. This system is sometimes known as "vacancy decontrol" - on a vacancy the rent is 'decontrolled'. The same system was maintained by the previous Liberal government and is in place today. As s. 113 of the *Residential Tenancies Act* states: "the lawful rent for the first rental period for a new tenant under a new tenancy agreement is the rent first charged to the tenant."

Another significant change has been made to the procedures for adjudicating residential tenancy disputes. Under the *Landlord and Tenant Act Part IV* landlord-tenant matters were dealt with by the superior courts, as were and are commercial tenancy disputes. When the *Tenant Protection Act* was introduced the government also established an administrative tribunal (an inferior court limited in jurisdiction to matters given to it by statute) to handle residential landlord-tenant matters. It was called the Ontario Rental Housing Tribunal. When the current *Residential Tenancies Act* came in the tribunal system was retained, but its name was changed and it is now called the Landlord and Tenant Board. Decisions of the Board can be reviewed (reconsidered on questions of law) in the Divisional Court.

Residential tenancies law can obviously be set against the general background of some of the themes of this course - particularly the ideas that property is a bundle of rights and that the content of property regimes and the arguments supporting one or the other are matters of social choice and change over time. The legal reforms first introduced in the 1970s by the *Landlord and Tenant Act Part IV* have remained largely unaltered since then. However there have been changes to the rent control scheme, as noted above.

The general thrust of the various legislative changes begun in the 1970s has been to make the conceptual basis of residential tenancies law different from that of commercial tenancies in two fundamental ways.

First, while the commercial lease is still an estate, the residential lease is a contract for accommodation. The *Residential Tenancies Act* as a whole is underpinned by this idea, but we can also point to particular sections as shifting the conceptual basis from estate to contract law. Some sections introduce contractual doctrines (s. 16 mitigation; s. 17 interdependence of covenants; and s. 19 frustration). The interdependence of covenants section has less significance than it might seem to have, because the termination sections, discussed below, provide a complete code for when a tenancy can be terminated by the landlord. But it does operate to permit the tenant to withhold rent where a landlord is in serious breach of its obligations. Tenants have been able to take advantage of it, for example, where the unit was full of cockroaches or where the hydro was cut off because the landlord did not pay the bill.

Other "contractualisation" provisions include section 40, which abolishes distress. In addition, section 3, the application section, refers to "rental units in residential complexes", not to leases or demised premises or the like. The lease-licence distinction is also done away with by the definition of "rental unit" as including "a room in a boarding house, rooming house or lodging house and a unit in a care home."

Second, while the terms of the commercial lease are largely a matter for the parties to negotiate, a residential contract for accommodation is in significant ways a regulated contract; the power of the parties to make their own terms is substantially curtailed. This second point is somewhat less true of the current Ontario legislation than it was of the pre-1997 regime, in that the rent control regime has been changed. But it remains the case that the legislation in many other areas takes away the ability of the parties to bargain and substitutes imposed terms. One example of this second theme is the repair and fitness for use provision (s. 20). This changes the common law, which put the repair obligation on the tenant unless the parties bargained otherwise. It requires the landlord to both provide and maintain premises in good condition.

Underpinning this second theme is the idea that there is an inequality of bargaining power between residential landlords and tenants. The market, and thus the common law which both derives from laissez-faire and advances it, was considered an inappropriate form of ordering, because truly free bargaining did not take place. The consequences of this idea about the inequality of bargaining power include the prohibition of "contracting out" (s. 3), the elimination of landlords' "self-help" remedies (ss. 21, 25 , 39 and 40), the prohibition of "no-pet" clauses (s. 14) and statutory security

of tenure (see ss. 37 *et seq*, and this chapter).

Note also that in various ways the Act seeks to ensure that tenants understand their rights. On occasion this is done by attempts to use plainer language than is used for common law concepts (see the mitigation section, s. 16, for example, as well as s. 40), which does not refer to distress while abolishing it. At other times it is done by imposing requirements on the landlord to provide the tenant with information about his or her rights. See in particular sections 11 and 12. Obviously this reflects the fact that residential tenancy law is an area that often affects the poorest members of society.

The various acts specifically about residential tenancies are not the only statutes that govern the area. Other statutes directly relevant include the *Human Rights Code* which prohibits discrimination in the provision of accommodation. The *Code* has also in recent years affected the operation of some of the termination (eviction) provisions, as discussed below.

SECURITY OF TENURE

The major change in residential tenancies law in Ontario has been the introduction of security of tenure. The statutory sections are 37 – 39; section 38 is the key section. They are not as clear as they could be, but what they say is that in Ontario the tenant has substantial, though by no means complete, security of tenure. The tenant is not obliged to leave merely because the tenancy agreement expires; rather, the agreement is deemed to continue on a month to month basis. The right of the tenant to occupy is thus separated from the tenancy agreement (note that the word lease is not used, it's called a tenancy agreement, part of the move away from estate to contractual ideas and language.)

The tenant's security is not absolute. He or she may be obliged to leave for certain reasons, dealt with in the sections below entitled "Termination of Tenancies: Landlords' Rights" and "Termination of Tenancies: Tenant Fault".

There is some security of tenure greater than that given by the common law in most Canadian jurisdictions, though its extent varies.

Security of tenure, and the other legislative reforms of the 1970s in Ontario, represent a substantial shift of strands in the bundle of rights from landlord to tenant. This was effected because of a societal consensus that an apartment was a home even if its occupier did not own it, and that the law ought to provide protections to the home above and beyond what the market and the common law could provide.

At the same time that security of tenure was introduced, a similar consensus formed around the idea that there ought to be minimum basic standards in housing; hence the fitness for use and repair provisions, for example, which can be seen as a form of consumer protection legislation.

TERMINATION OF TENANCIES: LANDLORDS' RIGHTS

The *Residential Tenancies Act* regulates the relations between landlords and tenants. But it does not require property owners to be landlords, and thus one set of reasons for termination acknowledges that property owners can make choices about the use of their property. Sections 48 (personal occupation by the landlord or close family member) and 49 (personal occupation by a purchaser of the building) and 50 (non-residential uses and/or extensive renovations) can be so categorised. Of these the principal one is s. 48. Note that these sections can only lead to termination at the end of the tenancy agreement, and require substantial notice to the tenant. They also give the tenant a right of early termination and, under ss. 52 and 54, require compensation in some cases.

The *Act* restricts the types of buildings that sections 48 and 49 apply to in some circumstances. Section 72 (2) deals with situations where there are co-owners of a building. In that circumstance no one individual is the landlord, all are, and thus no one individual could invoke s. 48. Co-owners at one point tried to get around this, by executing an agreement amongst them which gave each individual co-owner the right to occupy a particular apartment. Not surprisingly this was sometimes abused to get rid of unwanted tenants. Section 72 implicitly allows the individual co-owner to be the landlord for a s. 48 application if there is such an agreement among co-owners, but restricts the operation of the section in two ways. It states that the Board must refuse the application unless:

a) the building contains no more than four units, or
b) one or more of the permitted class (landlord, spouse etc) "has previously been a genuine occupant of the premises."

It might be assumed that a corporation, although a legal person and often the landlord, cannot be a landlord for the purpose of s. 48, which requires that the 'landlord' or spouse etc 'personally occupy' the vacated premises. In fact in two circumstances a corporation can avail itself of the provision. In *Edward Slapsys c/o 1406393 Ontario Inc* v. *Abrams* [2010] OJ No. 4452 the Court of Appeal confirmed that the sole shareholder of a corporation could invoke the section for personal use even though title to the building was in the corporate name. And in the recent case of *York Region Condominium Corp No 639* v. *Lee* [2013] OJ No. 647 the Divisional Court allowed a condominium corporation to do so. A building of c. 150 units was almost entirely occupied by individual unit owners. One unit was owned by the condominium corporation, along with other common areas of the building. Until 2007 this unit was occupied by the building superintendent, obviously an employee of the corporation. In 2007 the corporation switched to using an off-site superintendent, and rented out the unit to a tenant. In 2012 it decided to again use an on-site superintendent and the corporation applied to have the apartment vacated for its personal use. A member of the Landlord and Tenant Board held that a corporation could not personally occupy an apartment, and refused the application. The Divisional Court stated that as a general matter a corporation could 'occupy' any piece of real estate through its officers, employees etc. , and 'must surely be able to occupy a rental unit for the purpose of residential occupation incidental to its status as a landlord.' Thus: 'when a corporation that is the landlord of a building occupies a rental

TERMINATION OF TENANCIES: TENANT FAULT

There are a number of causes for eviction which involve some fault by the tenant. Although I have distinguished these from those above, based on landlords' rights, the causes discussed in this section also involve landlords' rights. That is, it is not so much the fact that a tenant has done something "wrong," but that the tenant fault affects the landlord's economic interest or the integrity of the reversion. Tenant faults can affect the former directly (for example non-payment of rent) or indirectly (for example interference with the reasonable enjoyment of other tenants). Tenant faults can also affect the reversion in a physical sense (see the undue damage provision) or reputationally (such as through commission of an illegal act).

With one exception eviction for the causes discussed in this section can happen before the end of the term of the tenancy, unlike the causes discussed in the previous section. Notice periods for some causes, especially for illegal acts and impairing the safety of others, are quite short.

I will discuss (most of) these causes in the order in which they appear in the *Act*. There is not time nor space to discuss them in any great detail, especially as the only way to get a sense of how they are applied is to read a great many short administrative tribunal decisions which turn on the facts. Although some cases go to the courts, there are relatively few reported cases.

Persistent Late Payment of Rent

Section 58 (1) 1 , - persistent late payment of rent - can lead to eviction at the end of the term, the only "tenant fault" cause that does so. It can be invoked even if the tenant does not transgress s. 59, the non-payment section discussed below. However, it does take a long and consistent pattern of lateness. In *Senkow et al* v. *Manufacturers Life Property Corporation* (1990), 13 R.P.R. (2d) 243 (Ont. Div. Ct.), for example, the tenants were late with 25 of 29 rental payments, and this kind of consistent tardiness is usually what is required to invoke this cause for termination. In *Oxford Properties Group* v *Lorenzo*, 2015 ONSC 2130 the Divisional Court declined to reverse the Landlord and Tenant Board's decision that the tenant paying her rent late 11 times in 12 months, at ranges from 2-15 days, did not warrant an eviction order: 'Notwithstanding these late payments, the Board considered the respondent's long-standing tenancy, her history of paying rent on time except for the twelve month period in question and her stated commitment to begin paying rent on time henceforth now that her personal issues had resolved. The Board held that it would not be unfair to refuse the landlord's application, and dismissed it. … [G]iven the length of the tenancy, the personal circumstances of the tenant and her stated confidence to the Board that she would hereafter pay on time, it was properly within the Board's discretion and reasonable for it to decline to impose any conditions."

As we will shortly see with reference to section 59, generally the *Act* takes the view that it does not matter if the landlord gets rent late, only that it is received sometime. Hence the tenant's interest in the home generally takes precedence over the landlord's convenience, given that ultimately the landlord will have its economic interest protected by payment, albeit late payment. But s. 58 also stands for the proposition that at some point the inconvenience to the landlord does override

security of tenure.

Non-Payment of Rent

Not surprisingly non-payment of rent is the most common cause for termination. Section 59 (1), gives the landlord the right to terminate the tenancy with 14 days notice. Note that section 59 (2), states that if the tenant pays before the notice period expires the notice to terminate is automatically void. Hence, in effect, the tenant has 14 days to pay. Similarly to commercial tenancies, the idea here is that the tenant's investment in the premises, in this case a home, overrides the landlord's interest in getting the rent on time. Since the landlord's interest in rent is an economic one, it is secondary to the tenant's security, so long as payment is ultimately forthcoming.

There are many other ways for the tenant to avoid termination even after the 14-day period has expired. One is in s. 59 (3), which voids the notice if the tenant pays before the landlord applies to the Board for an order terminating the tenancy. Per s. 74 (1), a landlord cannot make that application "before the day following the termination date specified in the notice."

Section 74 (2), provides another point along the path to eviction for the tenant to avoid eviction - paying before the Board issues an eviction order, that is, between when the landlord applies to the Board and when the hearing is held. At this stage the tenant must also pay the landlord's application fee.

A further chance to make good is in s. 74 (3) and (4), which voids an eviction order if rent owed (and now costs as well) is paid before the eviction notice becomes effective.

The purpose of these provisions is obviously to give the tenant as much time as possible to pay and avoid eviction. Even if a tenant is unable to pay at any of these stages, he or she may still apply for relief from eviction, a matter discussed in a later section.

Illegality

Section 61 is the illegality section. It contains an important change from both of the previous Acts. It states that a tenant can be evicted if either the tenant or another occupant of the rental unit commits an illegal act. Prior to 2006 it was only possible to evict a tenant for the actions of another occupant if one could also establish that the tenant had permitted the illegal act. Under the current legislation the landlord need only show that the tenant 'permitted' the illegal act if it was actually done by some third party, not an occupant. Some 'occupant' cases involve room-mates, but most involve adult children.

Note that, per s. 75, it is not necessary for the tenant or occupant to have been convicted criminally of an illegal act to invoke this section. Indeed they need not even have been charged, although as a practical matter a charge is a good source of evidence for the landlord. In *Toronto Community Housing Corp* v. *Norton* [2006] O.J. No. 2711 (Div. Ct.) the tribunal found that an illegal act had

been committed even though the criminal charge was withdrawn.

In addition, the landlord need not prove the illegality on the beyond a reasonable doubt standard. This is a general common law rule - where a finding of criminal activity is needed to trigger a civil consequence, only the civil standard is required on the threshold question of the criminal act. It has not always been the case. Until 2008 courts applied a variety of standards in between reasonable doubt and balance of probabilities where criminal conduct was an issue in a civil proceeding. This included eviction for illegal act cases: see in particular *Bogey Construction Ltd* v. *Boileau* [2002] O.J. No 1575 (Div. Ct.). However, the Supreme Court overruled all such decisions in *F.H.* v. *MacDougall,* [2008] S.C.J. No. 54. It stated: "I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof." This is not to say that the legislature cannot choose to impose a higher standard. The Ontario *Police Services Act*, for example, requires misconduct to be proved against a police officer on "clear and convincing evidence."

The courts have put an additional gloss on the meaning of "illegal act" in this section. The act need not be a *Criminal Code* offence, it can be any contravention of a statute, including the *Residential Tenancies Act*. However, the offence must be a serious rather than a trivial or technical one, and, most importantly, it must have the potential to affect the character of the premises or disturb the reasonable enjoyment of the premises by the landlord or other tenants: see *Samuel Property Management Ltd.* v. *Nicholson* [2002] O.J. No 3571 (C.A.), confirming a number of prior decisions of the Divisional Court. This illustrates a point made at the beginning of this section - a tenant is not to be evicted because he or she does something wrong, but only if the transgression has some relevance to the landlord, either harming the landlord's reputation or his or her economic interests.

Many of the cases on what is now s. 61 involve drugs, and in those cases the courts usually terminate tenancies as a result, especially if trafficking is involved. Indeed note the different notice periods for production/trafficking in drugs offences than for all other offences.

Because illegal acts are considered more serious than non-payment of rent or causing damage or interfering with the enjoyment of other tenants (below), there is no "make good" provision as there is for sections 59, 62 and 64. Moreover, per s. 71, a landlord can apply to the Board for eviction immediately on issuance of the notice to the tenant; he or she need not wait until after the notice period expires, as is the case with s. 59.

Damage

Section 62, p. 486, is straightforward - a tenant can be evicted if the tenant, or another occupant of the rental unit, or a person whom the tenant permits to be in the unit, causes undue damage. Note that as with non-payment of rent there is a "make good" provision which voids the application if it is complied with. A landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Interference with Reasonable Enjoyment

Section 64, allows eviction for "substantial" interference with the reasonable enjoyment of the premises by other tenants or by the landlord. As with s. 62, there is a requirement that the notice of termination specify the problem and give the tenant seven days to "make good", in which the case the notice becomes void. As with the undue damage cause, a landlord cannot apply to the Board for an eviction order during the 7-day remedy period, but may do so immediately afterwards: see ss. 70 and 71.

Section 64, and section 66 below, must be read in conjunction with s. 76, which, given the prohibition on "no-pet" clauses, defines what role an animal can play in a termination application.

It is difficult to be precise about what kinds of conduct represent a sufficient interference to invoke the section. Aggressive and /or noisy behaviour is often the problem, and there are many cases in which the finding has been that one has to put up with a certain amount of noise and disturbance in an apartment building, especially one containing lots of children. Indeed in one instance a tenant's over-sensitivity to noise, which resulted in frequent complaints, was held to be itself behaviour which interfered with other tenants! Other causes for complaint have included a failure to clean and smoking.

Section 64 really deals with problems between tenants, and that observation leads to two other ones. Firstly, it actually gives tenants a remedy against their tenant neighbours that non-tenants do not have. Non-tenants must use whatever other legal resources, if any, are open to them. The point is made by *Laing* v. *Brushette* [1996] O.J. No. 2732 (Gen. Div), in which the landlord, the owner of a condominium unit, sought to evict a tenant who disturbed the other residents of the building. But those other residents were owner-occupiers, not tenants, and the section, which refers to tenants and not neighbours, was not available to the landlord as a result.

Second, and also using the *Laing* example to make the general point about tenant fault made at the beginning of this section, s. 64 does not give a landlord the right to evict because a tenant behaves badly. It only gives him or her the right to do so only if that behaviour affects other tenants and by doing so affects the landlords' economic interests.

In recent years the *Human Rights Code*, particularly the prohibition of discrimination against those with mental disabilities, has had an impact on the use of s. 64, although usually in the context of whether relief from eviction should be granted: see the *Walmer Developments* case below.

Obviously the same kinds of problems that can invoke the operation of s. 64 can occur in other 'neighbour' contexts, with the closest being condominium buildings. The equivalent to eviction in such buildings is a forced sale, and this was ordered in one very unusual case, *The Owners Strata Plan LMS 2768* v. *Jordison and Jordison*, 2013 BCCA 484. The condominium by-laws included a provision that 'A resident or visitor must not use a strata lot, the common property or common assets in a way that, ... (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot.' For years other residents complained of the Jordisons' 'obscene language and gestures, ... interference with the activities of others, ... spitting at other residents, [and] unacceptable loud and unnecessary noise.' They also ignored court orders to cease and desist. The governing legislation, the *Strata Property Act*, S.B.C. 1998, c. 43, s. 173, gave the courts powers to (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules; (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules; (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b). The British Columbia Court of Appeal held that (c) included the power to order the Jordisons to sell their unit. The Jordisons argued that such an order was an abrogation of their right to property and could only be made if the legislation expressly authorised it. The BCCA agreed that its order did take away property rights, but based their order on two factors. First, enforcement of the non-interference provision would be 'stymied' if only lesser measures (fines, injunctions) could be employed but were, as in this case, ignored. Second, this was a case involving competing property rights: 'The scheme of the Strata Property Act includes the property rights of other owners of the strata.... The ... private property interest [of the Jordisons] ... must yield to the rights and duties of the collective.... The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting.'

Impairment of Safety

Section 66 allows eviction for an act or omission done in the residential complex which "seriously impairs" or "has seriously impaired" the safety of "any person." Note that there is no make good provision in s. 66, a relatively short notice period (10 days), and the act complained of does not have to impair the safety of another tenant or the landlord, but of "any person." This last aspect was brought in under the *Tenant Protection Act* and retained in the current Act; the old *Landlord and Tenant Act* required another tenant's safety to be impaired.

Acts found to have impaired safety include threatening behaviour (especially wielding a weapon), disconnecting smoke alarms, and starting fires. In one case the fact that other tenants subjectively felt intimidated by a tenant was held to be insufficient grounds; there must be objective evidence of actions/behaviour.

Picking up on the previous discussion about eviction and the *Human Rights Code*, in *Peel Living* v. *Gill* [2005] O.R.H.T.D. No. 6, a tenant who believed that voices in his head were telling him to burn down his apartment and kill himself by jumping from the balcony was evicted. The landlord had contacted the tenant's family, the Canadian Mental Health Association, and other agencies, but the tenant refused all help, declaring himself not to be mentally ill. The tribunal held that the duty